Supreme Court, U. S.
FILED
MAY 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

TERM, 1980

No. 79-1780

ALAN FELS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO WRIT OF CERTIORARI

DONALD M. MOSER,
BURTON A. ROSE,
Counsel for Petitioner,

PERUTO, RYAN & VITULLO,
Washington West Building,
N.E. Corner 8th and Locust Streets,
Philadelphia, Pennsylvania 19106
(215) 925-5800

Pennsylvania Appellate Printing Co.—Call Toll Free—1(800) 526-7560

TABLE OF CONTENTS

Appendix A
Opinion of the U.S. District Court,
Hon. J. William Ditter, Jr., J. 1a

Appendix B
Opinion of the Court 21a

Appendix C
Sur Petition for Rehearing 24a

Appendix D 26a

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION

No. 79-32

UNITED STATES OF AMERICA

vs.

ALAN FELS

OPINION OF THE U.S. DISTRICT COURT HON. J. WILLIAM DITTER, JR., J.

(509a) PROCEEDINGS

Morning Session

THE COURT: I have before me the defendant's motion to suppress any evidence seized by the arresting officers on January 7, 1979, and his motion to suppress any statement which he may have made at that time.

A full hearing has been conducted in this matter and I will make certain factual findings and reach certain conclusions of law. However, as the parties know, I will be doing this without the benefit of the notes of testimony

and I will be relying upon my recollection of the testimony and therefore, if it's necessary to do so, I reserve the right to amplify these findings of fact and conclusions of law which I reach.

I will refuse the motion to suppress evidence and to suppress the defendant's statement.

This matter arrises out of a series of events, the most important of which took place on January the 7th of (510a) 1979. At that time Drug Enforcement Agent Stephen Hopson had arranged with a confidential informant, Glenn Aumack, to make a purchase of drugs, or a drug, from one Robert James.

In order that this transaction might be accomplished, a room was engaged at the Holiday Inn in New Hope, Pennsylvania, which is in Bucks County. New Hope is in Bucks County, Pennsylvania. In addition, the assistance of local county detectives and the local police chief was secured.

As a result of one or more telephone calls, Robert James, together with his wife, Jackie James, came to the holiday Inn at New Hope and had a conversation with Aumack and an undercover DEA agent. Following this conversation Mr. and Mrs. James left and drove approximately one mile to a home now identified as the residence of the defendant, Alan Fels. The conversation that they had in the motel room was overheard by other DEA agents, and as they drove to the Felses' residence they were under surveillance. The Felses' residence was placed under surveillance, and in approximately half an hour Robert James was observed leaving the Felses' residence and he thereafter returned to the Holiday Inn Motel at New Hope. Mrs. James did not emerge with him and, in fact, remained at the Felses' residence.

The arrangement had been made that he would sell to Aumack one pound of cocaine for $30,000, but it was understood that he would first of all be given an opportunity to (511a) count the money, which he did, and when he came back he brought back a half of a pound for which he was to be paid $15,000, the understanding being that he would then go back and get the other half pound and receive the additional $15,000. Instead, however, as soon as he received the money and turned the cocaine over to Aumack, and as soon as Aumack tested it, he was arrested by the DEA agents who were nearby.

After a conversation with James the DEA agents and the county detectives and the local police chief all went to the Felses' residence. Entrance was obtained and Mr. Fels was placed under arrest.

He also made certain incriminatory statements, statements which are sought to be suppressed by this present motion.

In addition to that, a search was made of his residence and certain incriminatory substances were found and it is these substances that he seeks to have suppressed.

The first matter with which I wish to deal and with some particularity is whether or not there was probable cause to enter the Felses' residence without a warrant.

In the first place, the officers knew that Jackie James was there at the Felses' residence. It has been argued to me that the officers knew that she was not a real participant in the drug sale. However, the evidence, while (512a) it may establish her participation was only minimal, it does establish that she did participate in the event. She knew full well that her husband was making an arrangement to sell cocaine to Mr. Aumack. She was present when the

matter was discussed. She had accompanied her husband to the meeting at the motel. Although she said little she did not demur in anyway from that which was being discussed or suggest that she wanted to have no part of it, nor did she suggest that her husband should have no part of it. Voluntarily she went to the place where she knew he was going to obtain the drugs in question, and she voluntariyly stayed there. In other words, she did not go some place else. She did not try to limit her participation in the matter, nor to become separated from it in anyway. The fact that she was present, the fact that she lent the support of her presence shows that she may well have had some role in the transaction. Thus, there was reason for the officers to believe that she played a role in this drug transaction.

By the time the officers knew she had remained in the Felses' residence they also had reasonable cause to believe that this was the place from which Mr. James had obtained the drugs in question.

It has been argued to me that the magistrate concluded that there were no grounds to hold her for further prosecution. I consider this to be irrelevant, at least so (513a) far as these proceedings are concerned. We're not concerned with the conclusion of the magistrate, but whether or not there was reasonable cause on the part of the officers to believe that Jackie James played a sufficient role in this transaction to warrant her prosecution.

In this regard it has been argued to me that Mr. Aumack was told that she was being arrested so that there would be leverage on her husband. This is not significant. Assuming it be true, the officers were justified in believing that Jackie James was a participant, their subjective belief at another time for placing her under arrest is not signifi-

cant so far as this matter is concerned. What we're concerned with is whether or not there was reasonable cause to believe that Jackie James was involved at the time that the officers went to the Felses' residence, and I conclude that there was probable cause to believe that Jackie James was indeed a participant with her husband in the illegal sale.

The next matter that concerns me is whether or not there was probable cause to enter the Felses' residence without a warrant.

Prior to their going to the Felses' residence, the officers had been informed that there were guns, more people, and more drugs at the Felses' residence. It has been argued to me that the source of this information was Glenn Aumack. The officers said that the information came from (514a) Robert James, but whatever the source, there were reasonable grounds for the officers to believe that there were people there, that there were guns there, and that there were more drugs there. This is particularly true so far as the drugs are concerned since the arrangements had been that Aumack would buy a pound of cocaine for $30,000 and in fact he only received a half pound of cocaine for which he had paid $15,000. Therefore, it was reasonable for the officers to believe that there were additional drugs at the Feles' residence, whatever may have told or by whomever they may have been given information.

The officers further knew that James had left with a half pound of cocaine and that he was expected to return with either it or the $15,000 within a short time. Mrs. James knew exactly where he was going to go and would know exactly how long it would take him to get there. She had planned to meet with Aumack later in the evening to have dinner and it was therefore reasonable for her and there-

fore reasonable for anyone else with whom she might speak to expect her husband, Robert James, would return to the Felses' residence within a very short period of time. The officers knew that if he did not return that suspicions would be aroused. After all, there was $15,000, or the equivalent in drugs, which had been in his possession and the officers knew that whomever the owner of that amount of drugs might (515a) have been that that person would be concerned with every moment that Mr. James was away from the Felses' residence.

It has to be borne in mind that this was a major, important, significant amount of drugs. This was not a street-buy of a bag of heroin, or an insignificant amount of marijuana, but it was an important and major source of cocaine.

It has to be borne in mind that this was a Sunday afternoon; that these events took place in New Hope; that the weather was poor. It was foggy. There was snow on the ground, and there was no time for the officers under these circumstances to obtain a warrant. Obtaining a warrant would not have meant merely going to either the federal magistrate or federal court house in the same vicinity, because there was neither federal court house nor federal magistrate in New Hope. And in fact, there was no state officer who was authorized to issue such a warrant in New Hope.

The officers may not have known it at the time, but it's entirely probably they did know because of the presence of the county detectives and their experience that the nearest district justice would be in Doylestown. In fact, when they later did obtain a search warrant it took them approximately one and a half hours to obtain it. Had they chosen to obtain a warrant before they returned to the Felses' residence, I conclude that suspicions would

have been aroused and either the remaining quantity of drugs would have been destroyed or (516a) successfully hidden or taken to another place. Therefore, I conclude that there were exigent circumstances under these facts which justified the officers' decision to proceed without obtaining a warrant.

In this regard I have considered United States versus Rubin, 474 Fed 2d 262, a Third Circuit case from 1974. I've also considered Dorman versus United States, 435 Fed 2d 385, which suggests the government, which obviously has the burden of justifying a warrantless search of a residence—that in determining whether or not the government has met that burden the court should consider certain circumstance: the gravity of the offense. Well, as I previously pointed out, this was a major transaction, an extremely serious offense. Whether the defendant was reasonably believed to be armed, from whatever source, the officers had been told that there were guns or a gun in the premises. While, of course, they didn't know it at the time this proved to be correct.

I consider that it was clearly established there was probable cause to believe that Jackie James was guilty of participating with her husband in the sale of the drugs. The officers had strong ground to believe that she was inside the residence. They had seen her go in. The residence had been kept under surveillance and she had not been seen to emerge. Under all the circumstances there was a high likelihood that either Jackie James or whomever might have the drugs could (517a) escape, or that the evidence could be destroyed if the officers did not act swiftly.

And finally I consider the time of the entry. It was not at night but in mid-afternoon. Now, the circumstances of the entry were, at least so far as Officer Hopson was con-

cerned, were not peaceful, was not a peaceful entry since he kicked the door until it brok, but other officers did enter peacefully and I will deal more with the actual entry in a few moments.

Based on all that I have said, I conclude that the officers had probable cause to proceed immediately to the Felses' residence and to effect entry, even though they did not have a warrant. In other words, I conclude that the government has carried its burden in justifying a warrantless search of the Felses' residence.

The next matter with which I wish to deal is the entry itself. In this regard Officer Hopson testified that he knocked on the door; that he pressed his face to the door or close to the door and that he held up his badge. The defendant testified that he saw Officer Hopson; that he saw the badge; that he heard Officer Hopson say, "Federal narcotics, open up." In other words, the defendant testified that he saw the badge and that he heard what Hopson said, and this is exactly what Hopson said he said.

According to Agent Hopson the defendant then (518a) turn and ran. The defendant said that he took a few steps, but I credit the officer's testimony in this regard, that the defendant turned and ran toward what Agent Hopson now knows to be the kitchen. The defendant in explaining this said that he heard the buzzer and was heading to answer the door. I do not credit this account. There was no testimony that anybody pressed the buzzer, and it would be highly unreasonable and unusual for someone having heard an officer say, "Federal narcotics, open," to decide at that point it was more important to go to another door than it was to attend the obvious situation at the door which he was only a few steps away from, according to his testimony about three or four feet away from the door.

It is admitted that Agent Hopson did not state his purpose. In other words, he did not say, "I want to arrest Jackie James," or, "I want to find out where the cocaine is," or anything like that. But I also conclude that it would have been pointless for him to do so. At that moment Mr. Fels was moving away from the door and was not making any inquiry as to "What do you want" or, "Why do you want to come in?" And in view of the exigent circumstances it would have been no point in Agent Hopson saying anything further than that what he did say. In this regard I have read United States versus Wysong, 528 F.2d 345, a Ninth Circuit case in 1976; United States versus Artieri, 491 Fed 2d 440, a Second (519a) Circuit case of 1974, and that case cites Ker versus California, 374 United States 23, also reported at 83 Supreme Court 1623, a case which makes it clear that not all the criteria of 18 United States Code, Section 3109, have to be complied with in every case. As counsel knows, 18 United States Code, Section 3109, is a section of the United States Code which deals with what an officer is to do when he enters to make a search with a search warrant.

I might add, although perhaps it's not dispositive of the maatters before me, that other officers came in other doors, and in fact there was evidence that the defendant had actually opened one of the other doors. Under those circumstances, since entry was effected without a breaking of the door, the fact that Agent Hopson broke the door when the defendant ran from it may have no significance at all.

Therefore, I conclude that under all the circumstances the entry in the Felses' residence was reasonable, that the officers acted as they acted motivated by the exigent circumstances which were then present.

Once inside the premises there was a conversation between the defendant and one or more of the officers, and

it was the testimony of Detective John Mullin of the Bucks County District Attorney's Office that he had a conversation with the defendant. Several officers entered and there was an immediate question posed as to who was the tenant, or who was (520a) the owner of the property, to which the defendant responded that he was. He was then told that Robert James had been arrested and that he, Robert James, had been observed coming from this house prior to his arrest. At that point the defendant blurted out, according to the testimony of Detective Mullin, which I accept as being truthful and accurate, "All right, I'll show you the rest of the stash."

At that point Detective Mullin immediately gave the defendant his Miranda warnings. It has been suggested at that point, or prior to that point, that that arrest was improper. I do not recall if there was any testimony which any officer said, "You're now under arrest." But I think that it is plain that he was under arrest as soon as he blurted out, "All right, I'll show you the rest of the stash." Until that time he may have been detained in the same type of detention that's discussed in Terry versus Ohio, which admittedly deals with detention on a street, a public property and not in a residence, but that type of detention while an officer is making a further investigation has been permitted by the Supreme Court and whatever short period of detention prior to arrest for the purpose of investigation may have existed in this case was entirely proper under the teaching of Terry versus Ohio.

I conclude, however, that once the defendant blurted out, "I'll show you where the rest of the stash is," (521a) that he was at that point under arrest and not free to leave the premises, and in fact was kept in constant sight by the officers thereafter.

I now turn to the matter of—well, before I leave the matter of arrest I also conclude that he was given his Miranda warnings. At that point he was read those rights from a small card which one of the county detectives carried, and to show his understanding of the Miranda warnings he signed this card, as Mr. Fels himself admitted. There was no assertion on his part that he did not receive the Miranda warnings, so I conclude that he was adequately warned of his right to be silent. He choose to waive his right to an attorney and his right to remain silent.

I now turn to the matter of the search of Mr. Fels' premises. In this regard two arguments have been presented to me by the government. First, that the search was a consensual search, and, secondly, that a search warrant was obtained.

Now, with regard to the consensual aspects of the matter, there is testimony from Detective Mullin that he had a conversation with the defendant in which he said that, "We don't want to see where your stash was," or refused to look at the stash until some arrangement about a search had been made. At that point Detective Mullin informed the defendant, Alan Fels, that they had—that they, the officers, had no (522a) right to search the premises, but that he could give them that right if he consented to their search. He was also told that he could consent or not consent as he wished, that it was strictly up to him. He was also told that whether or not he consented they were going to get a search warrant in any event.

He then signed a form, a form which was described as a federal form which set forth certain rights which he had, but this form was not produced in evidence, nor was any similar form produced in evidence, so that I have no knowledge as to exactly what the form said.

Under all the circumstances, however, I conclude that he did give his consent and that he gave it voluntarily, and in this regard I have re-read Schnechloth versus Bustamante, 412 United States 218, and also United States versus Shields, 573 Fed 2d at page 18, a Tenth Circuit case, 1978.

As an academic matter, however, I'm not sure that it makes much difference whether there was a consensual search or not. However, I conclude that there was, but thereafter a search warrant was obtained. Now, in this regard I must bear in mind the provisions of Federal Rules of Criminal Procedure Number 41. Section (a) of that rule provided that:

> "A search warrant authorized by this rule may be issued by a federal magistrate or a judge (523a) of a state court of record within the district wherein the property is located, upon request of a federal law enforcement officer or an attorney for the government."

It has been argued to me that—well, first of all by way of factual background.

Detective Mullin testified that when it became known to him as a result of his conversation with Alan Fels that there were additional drugs on the premises, that he, Detective Mullin, decided that before any search was made, or at least before any seizure was made in which he was going to participate, that he would talk with an assistant district attorney of Bucks County who suggested to him that no matter what Mr. Fels said to him, had said, the appropriate thing to do would be to obtain a search warrant. He made this fact known to the federal officers who were present and it was agreed that such a search warrant would be obtained and thereafter, although Mr. Mullin remained with Mr. Fels and was in Mr. Fels' presence for the rest of the

afternoon, two of the federal officers, Agent Kean and Agent Hopson, went with the police chief, Chief Mangan. The two federal officers and Chief Mangan went to the office of the district justice in Doylestown to obtain a search warrant.

It has been argued to me that the district justice was a court of record and in this regard certain provisions (524a) of the laws of Pennsylvania have been cited to me. However, I conclude that the district justice is not a court of record. Although the rules of Pennsylvania provide that all courts are courts of record, I note how the statute also sets forth and describes the judicial system setting forth, for example, the Supreme Court, Superior Court, the Commonwealth Court, the Court of Common Pleas, and so forth, but then does not refer to district justices as being a court. It refers to them as being district justices and therefore I conclude that a district justice is not a court of record for the purpose of Rule 41.

Now, Rule 41 does not exist to limit the activities of federal officers when they cooperate with state officers, and this is pointed out in United States versus Burke, 517 Fed 2d 377.

In an inquiry of the type that I'm making, the thrust should be whether either the federal or the state officers violated the Constitution in the course of making the search. If a warrant is applied for and obtained by state officers, any special rules of the state apply, so far as they are not violative of the United States Constitution. It is only when the federal officers obtain a warrant that the special rules of Rule 41 apply, and this is pointed out to me by United States versus Benford, 457 Fed Supp 589, 595.

Turning to United States versus Bedford, (525a) 519 Fed 2d 650, a Third Circuit case, I learn that whether a

search conducted pursuant to a state warrant is characterized as a federal or state search depends upon the extent to which the federal officers were involved in the search and seizure and therefore my inquiry at this point must be directed to the involvement of the federal officers in the search and the seizure of Mr. Fels' property.

As I have previously stated, there is no question in my mind that the particular arrangements for the buy made from Robert James by Glenn Aumack were made; that these arrangements were made by federal authorities. There is no question about the fact that federal authorities were participating in matters here; that there was federal money; that as a result of a federal investigation, as a result of a confidential informant obtained by the federal authorities, and that in many respects up until the time that the entry was made into the premises, the federal agents were deciding what should be done and how it should be done. Thereafter, however, what was done was done at the direction of the state officers.

My inquiry at this point has to be directed to the involvement of the federal officers, or the involvement of the state officers, insofar as the search and seizure is concerned. In this regard I have to be, and am, aware of the fact that the suggestion that a search warrant might be required was a matter that occurred to Detective Mullin. As I have (526a) previously identified him, he is a Bucks County detective. In other words, he was a state or local officer. He thereafter contacted an assistant district attorney of Bucks County, and having conferred with him determined that a warrant should be obtained.

Mr. Mullin decided that he would touch nothing and nothing should be touched by any officer until such time as a search warrant was obtained. Thereafter, the officers, as

I have previously stated, went to the district justice office for the purpose of obtaining a search warrant. On the way to that office there was a conversation by and among the police chief, Richard Mangan, and Agents Kean and Hopson, and at that point the agents told the police chief some of the details of which he might not have been familiar. However, since he had been in on the preliminaries, in other words, the matters that took place prior to the time that entry into the Felses' residence was made, he, Richard Mangan, was fully aware of many of the efforts from what he had personally observed, or from other information that he had received during the course of the purchase from Robert James which was made by Aumack.

He also was quite aware of what had occurred at the time Mr. Fels' residence was entered because he was one of the participating officers. When they got to the officers' district justice the affidavit to obtain the search (527a) was taken by Chief Richard Mangan, as is plainly shown on the face of the affidavit.

The affidavit and application for a search warrant charge a violation of state law, Act 64 of the Control Substances Drug Devices and Cosmetics Act. The warrant that was issued was directed to a local officer as contrasted with being directed to a federal officer, and it was stated that it was to be executed in accordance with state law. In other words, a time during which it was permissible to execute the warrant was alto stated, which was a requirement of the state law.

After the search warrant had been executed the defendant was taken before the district justice where a complaint was filed against him under state law and he was subsequently indicted for a violation of state law.

As pointed out by United States versus Bedford, certain circumstances should be considered in determining whether

or not a warrant and a subsequent search and seizure were carried out by state officers or by federal officers. As I have previously said, although I conclude that the matters surrounding the actual purchase from Robert James were matters of federal activity, I conclude, so far as search and seizure was concerned, this was a matter of state activity under a state warrant and carried out by state officers.

In the first place, the warrant was issued (528a) under state law and was directed to state officers. It was predicated on a probable violation of state law. There was no evidence of bad faith on the part of either the state or the federal officers. There was no evidence that the federal agents supervised the search. There was no evidence that the defendant was arrested by other than state officers.

As I previously pointed out, his initial conversation was with Detective Mullin and it was Detective Mullin who determined that it was appropriate to read the Miranda warnings to Mr. Fels. The majority of the things that were seized, if not all the things that were seized, were found by local officers and the products of that search from the basis of a state prosecution.

Now, I am aware of the fact that the federal agents did assist in obtaining the warrant by giving Chief Mangan information, and they were present at the office of the district justice when a search warrant was being obtained. I'm also aware that they may have been participants in the search itself and, as I have previously pointed out, I'm certainly aware that the chain of events was placed in motion by what the federal agents did, but on balance and considering all of the factors, bearing in mind that the course of events were changed as a result of a conversation which Detective Mullin had with the assistant district attorney, I conclude that this was a state search warrant issued to state officers (529a) for state purposes.

If I have not previously referred to them, I note that my conclusions in this regard in part are buttressed by United States versus Benford, 457 Fed Supp. 589, and United States versus Burke, 517 Fed. 2d 377.

Based on all the circumstances I conclude that the search of the Felses' residence was a state search.

I must now turn to the effect of this search.

As I have previously stated, I concluded and reiterate my conclusion, that there was a consensual search; that under all the facts and circumstances it was a consensual search and that a suppression of the fruits of that search would not be justified. If I'm correct that there was a consensual search, then obviously the obtaining of a state search warrant did not do any harm. It would not have in any way voided the consensual search. On the other hand, if I'm incorrect in my conclusion that the search was a consensual search, I then conclude that the search warrant made valid that which had been accomplished.

It was testified that while the officers, Chief Mangan and the DEA agents, were going to the office of the district justice, that Detective Mullin and other officers went to the second floor with the defendant in response to his statement that he would show them where his stash was and that he obtained for them certain marijuana. I think it was described (530a) as being vials. There may have been various types of marijuana, I'm not sure, and also that he obtained for them a quantity of cocaine, and I recall at that point Detective Mullin was present because he said something about "How much is it worth?" and the defendant, Mr. Fels, said, "It represents my entire savings."

At that point these items were all placed on one of the beds in the bedroom and one or more of the officers kept these items constantly under guard until such time as the

chief of police returned with the search warrant. Thereafter, armed with the search warrant additional items were found by the searching officers, Chief Mangan and the county detectives, and with whatever participation there may have been on the part of the federal agents, although I do not recall there was any specific testimony as to just what the federal agents did, if anything, insofar as that search was concerned. But the search did uncover additional items which the federal agents identified for the state officials as being drug paraphernalia, scales and other matters.

Apparently it was a thorough search, because in discussing it Mr. Fels testified as to certain items, identified them, said that was something that hadn't been unpacked yet, or this was in the back closet, or various places he said these matters were kept.

I therefore conclude that even had there (531a) been no—what I will refer to as a consent search, that the items which were found and placed on the bed would have been found in the course of the search carried on by the officers in any event. In other words, I conclude that if the consent search was illegal that it was not so tainted that suppression is required, because the same items would have been found as a result of the search conducted with the search warrant in any event.

In this regard I have read such cases as Alderman versus United States, 394 U.S. 168, also reported at 89 Supreme Court 961; United States versus Galanti, 547 Fed 2d 733, a Second Circuit case of 1976; United States versus Cooper, 428 Fed Supp 652, and United States versus Barron, 229 Fed Supp 722, affirmed in part by the Third Circuit, 363 Fed 2d 62.

Therefore, I conclude that the search was a valid search by state officers and that the property seized in that search should not be suppressed.

It was also argued to me that the defendant's will was over-borne, and in this regard I heard testimony about the fact that certain of the officers had guns—a gun was placed to the defendant's head. This was denied by the officers, who did admit that guns were present, but it was denied that a gun was placed to the defendant's head, and I conclude that even if that had been true that it was only (532a) there for a moment or two, or at the time of initial entry. And again, I recall that the defendant ran from the officers and did not respond when there was a knock at the door.

It has been suggested that threats were made about the defendant's wife. I do not credit this testimony. I do not believe it. There was no need for such threats to be made. The officers had accomplished, or were accomplishing their purpose, even without such threats.

The defendant said that he was confused by reason of his appearance, by reason of his demeanor, by reason of the way he acted, by reason of the position that he has, the job that he has. I conclude that he is an intelligent man and not one whose will would be easily over-borne. There were many persons who were friends of his and I don't think their will was over-borne either. Although one of those friends came in and testified as to the presence of guns, I consider it significant that Mr. Freeman was unable to recall which hand the gun was in, what type of gun it was, and other matters that I thought were significant in view of his keen recollection as to other incidents and events.

Therefore, based on the hearing and based on the findings that I have made I'm forced to conclude that the motion to suppress, both as to the statement and as to the fruits of the search, must be denied and must be dismissed.

Any questions, gentlemen?

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1889

UNITED STATES OF AMERICA

v.

FELS, ALAN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. CRIM. NO. 79-00032-02

ARGUED FEBRUARY 22, 1980
BEFORE: ROSENN AND SLOVITER, *Circuit Judges*
AND LAYTON, DISTRICT JUDGE*

(FILED MARCH 5, 1980)

DONALD MOSER, ESQUIRE
BURTON A. ROSE, ESQUIRE (Argued)
Peruto, Ryan & Vitullo
Washington West Building
N.E. Cor. 8th & Locust Streets
Philadelphia, Pennsylvania 19106
Attorney for Appellant

*Honorable Caleb R. Layton, 3rd, Senior United States District Judge for the District of Delaware, sitting by designation.

PETER F. VAIRA
United States Attorney

WALTER S. BATTY, JR.
Assistant United States Attorney
Chief, Appellate Section

JOSEPH M. GONTRAM (Argued)
Assistant United States Attorney
3310 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106
Attorneys for Appellee

OPINION OF THE COURT

PER CURIAM

Appellant, Alan Fels, was convicted of conspiracy to distribute cocaine, a controlled substance, in violation of 21 U.S.C. § 846 (1976). He was sentenced to a term of three years imprisonment and five years special parole.

On appeal, appellant raises the following contentions:

(1) There was not probable cause for the arrest of Jacqueline Jones and her warrantless arrest was unlawful.

(2) The forceful entry into appellant's residence was unlawful for failure to comply with the requirements of 18 U.S.C. § 3109.

(3) Appellant argues that his statements made prior to the giving of the *Miranda* warning were improperly admitted into evidence.

(4) The Government has failed to meet its burden to prove that Fels' consent to the search of his residence was voluntarily given.

(5) The search warrant was sufficiently federal in character as to require suppression of the evidence seized for failure to comply with the "court of record" requirement of Fed.R.Crim.P. 41.

(6) The district court erred in receiving certain testimony from Agent Hopson of the Drug Enforcement Administration at the time of Fels' sentencing.

We have carefully considered the above contentions and find them to be without merit. Defendant also raises the contention that the district court erred in sentencing him to a term of special parole under 18 U.S.C. § 846.

In *United States v. Mearns*, 599 F.2d 1296 (3d Cir.), *cert. filed*, 48 U.S.L.W. 3276 (Sept. 12, 1979), we held that 21 U.S.C. § 846, conspiracy to distribute narcotics, does not allow for the imposition of a special parole term. In accordance with *Mearns*, it was improper for the district court to impose the special parole term for the conviction under U.S.C. § 846. Therefore, we will affirm the judgment of the district court in all respects with the exception of the imposition of the special parole term. The case will be remanded to the district court with instructions to vacate the five-year special parole term.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

JUDGMENT

Present: ROSENN and SLOVITER, Circuit Judges and LAYTON, District Judge*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on February 22, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 5, 1979, be, and the same is hereby affirmed in all respects with the exception of the imposition of the special parole term, and the cause is remanded to the said District Court with instructions to vacate the five-year special parole term.

ATTEST:

/s/ Thomas Pel
THOMAS PEL
Clerk

March 5, 1980

*Honorable Caleb R. Layton, 3rd, Senior United States District Judge for the District of Delaware, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1889

UNITED STATES OF AMERICA

v.

ALAN FELS,

Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER, Circuit Judges, and LAYTON, District Judge*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all

*Sitting by designation.

the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Max Rosenn
MAX ROSENN
Judge

Dated: April 7, 1980

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1889

UNITED STATES OF AMERICA

vs.

ALAN FELS,

Appellant.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until May 7, 1980.

/s/ Max Rosenn
MAX ROSENN
Judge

Dated: April 18, 1980